UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

SAN ANTONIO BAY ESTUARINE WATERKEEPER and S. DIANE WILSON ***Plaintiffs,***	§	
v.	§	**Civil Action No. 6:17-CV-00047**
FORMOSA PLASTICS CORP., TEXAS FORMOSA PLASTICS CORP., U.S.A., and FORMOSA PLASTICS CORP., AMERICA, ***Defendants.***	§	

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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TO THE HONORABLE KENNETH M. HOYT:

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants, Formosa Plastics Corp., Texas ("**Formosa Texas**"), Formosa Plastics Corp., U.S.A., and Formosa Plastics Corp., America (collectively, "**Formosa**"), move the Court to dismiss both claims of Plaintiffs, San Antonio Bay Estuarine and S. Diane Wilson (collectively, "**Plaintiffs**"), for lack of subject matter jurisdiction based on mootness. Further, should the Court not dismiss Plaintiffs' second claim as moot, Formosa moves for judgment on the pleadings with respect to that claim, pursuant to Federal Rule of Civil Procedure 12(c), for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

For the last twenty-five years or more, Formosa Texas has held a discharge permit from the Texas Commission on Environmental Quality ("**TCEQ**") authorizing it to discharge "trace amounts" of floating solids into Lavaca Bay and Cox Creek. By their Complaint, Plaintiffs allege that Formosa is violating its permit by discharging more than trace amounts of floating solids and that Formosa is failing to report such alleged permit violations to TCEQ. Immediately after Plaintiffs' filed their Complaint, however, TCEQ initiated an administrative enforcement action against Formosa Texas based on the same alleged permit violation—*i.e.*, discharge of more than trace amounts of floating solids. Since then, TCEQ has been diligently prosecuting its enforcement action against Formosa Texas in a proceeding in which Plaintiffs have actively participated. Moreover, just two days ago, TCEQ approved and issued an Agreed Order concluding that enforcement action. Under the TCEQ Agreed Order, TCEQ recognized the corrective actions taken by Formosa Texas in response to the enforcement action, assessed an administrative penalty against Formosa Texas, and ordered Formosa Texas to comply with

certain additional technical requirements. Unsatisfied with the terms of the Agreed Order entered in the TCEQ enforcement action, Plaintiffs wish for this Court to second guess the agency, assess a larger penalty, and require Formosa to comply with additional technical requirements to be spelled out by Plaintiffs' expert witness. However, because Plaintiffs' claims arise from the same alleged permit violation that was the subject of the administrative enforcement action concluded by the TCEQ Agreed Order, Plaintiffs' claims are now moot and should be dismissed.

II. FIFTH CIRCUIT STANDARDS GOVERNING THIS MOTION

Formosa moves for dismissal of both of Plaintiffs' claims—the claim for alleged discharge of more than trace amounts of floating solids in violation of the permit and the claim for failure to report such alleged permit violations to TCEQ—for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In addition, should the Court determine that the failure-to-report claim is not moot, Formosa moves for judgment on the pleadings with respect to that claim, pursuant to Federal Rule of Civil Procedure 12(c), for failure to state a claim upon which relief can be granted. Below are the Fifth Circuit standards for motions under both Rule 12(b)(1) and 12(c).

A. Standards for Rule 12(b)(1) Motions

A motion under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject matter jurisdiction. A district court has the power to dismiss a claim under Rule 12(b)(1) "on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996) (internal quotations and citations omitted). Thus, "[w]hen a plaintiff's allegations of jurisdiction are challenged ... the district court may consider matters outside the

pleadings." *Save our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1076 (5th Cir. 1978) (citing *Village Harbor, Inc. v. United State*s, 559 F.2d 247, 249 (5th Cir. 1977)).

The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). The plaintiff in a lawsuit constantly "bears the burden of proof that jurisdiction does in fact exist." *Menchaca*, 613 F.2d at 511. Moreover, a change in circumstances that eliminates the controversy at issue in a case destroys a court's subject matter jurisdiction and renders an action moot. A court must dismiss an action if it determines at any time that it lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

B. Standards for Rule 12(c) Motions

Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The standard to be applied when reviewing a Rule 12(c) motion is the same standard to be applied when considering a motion under Rule 12(b)(6). *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002). Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed if "it appears certain that the plaintiff cannot prove any set of facts in support of [its] claim which would entitle [it] to relief." *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. at 555 (quotation marks, citations, and footnote omitted).

III. EVIDENCE SUPPORTING 12(B)(1) MOTION

In support of this Motion under Rule 12(b)(1), Formosa relies upon and incorporates the following evidence:

Exhibit A: Declaration of Robert T. Stewart

A-1. Formosa Texas's *Authorization to Discharge Under the National Pollutant Discharge Elimination System*, issued August 16, 1993 (NPDES Permit No. TX0085570).

A-2. Formosa Texas's *Permit to Dispose of Wastes*, issued July 15, 1993 (Permit No. 02436).

A-3. Formosa Texas' *Permit to Discharge Wastes*, issued June 10, 2016 (TPDES Permit No. WQ0002436000).

A-4. TCEQ Exit Interview Form, dated March 21, 2016.

A-5. TCEQ Notice of Violation, dated May 13, 2016.

A-6. TCEQ Exit Interview Form, dated September 16, 2016.

A-7. Plaintiffs' Notice of Intent to File Citizen Suit for [Alleged] Violations of the Clean Water Act, dated April 6, 2017.

A-8. TCEQ Notice of Enforcement, dated May 1, 2017.

A-9. Correspondence from TCEQ to Formosa Texas, dated March 6, 2018, along with enclosed Proposed Agreed Order.

A-10. TCEQ Public Notice of Proposed Agreed Order, dated May 28, 2018.

A-11. Plaintiffs' Comments to TCEQ Regarding Proposed Agreed Order, dated June 26, 2018.

A-12. TCEQ's Response to Plaintiffs' Comments Regarding Proposed Agreed Order, dated November 27, 2018.

A-13. Final TCEQ Agreed Order

IV. STATUTORY AND REGULATORY BACKGROUND

A. Discharge Permits Under the Clean Water Act

The federal Clean Water Act ("**CWA**") prohibits the discharge of any pollutant into navigable waters of the United States except as authorized by a discharge permit issued under the National Pollutant Discharge Elimination System ("NPDES") program.[1] 33 U.S.C. §§ 1311(a), 1342. Under the NPDES program, the Environmental Protection Agency or an authorized State can issue a permit authorizing the discharge of pollutants subject to the terms of the permit. *Id*. § 1342(a)(1). Where a permittee discharges pollutants in compliance with the terms of NPDES permit, the permit acts to "shield" the permittee from liability under the Act. 33 U.S.C. § 1342(k); *see also Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1198-1204 (9th Cir. 2013); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 266-69 (4th Cir. 2001).

In Texas, the TCEQ has the authority to implement the NPDES program (including issuing discharge permits) and has primary enforcement authority under the CWA. *See* 33 U.S.C. § 1313(a), (d); TEX. WATER CODE ANN. § 26.027 (West 2018); *see also id*. § 5.013(a)(3) (granting the TCEQ general jurisdiction over "the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning").

B. Long History of Permits Authorizing Formosa Texas to Discharge Trace Amounts of Floating Solids.

Since at least 1993, Formosa Texas has held a discharge permit authorizing it to discharge various pollutants from specified outfalls (discharge points) at its Point Comfort plant

[1] There are other exceptions to the discharge prohibition set forth in the statute. *See* 33 U.S.C. § 1311(a).

(the "**Plant**") into Cox Creek and Lavaca Bay in accordance with various limitations and requirements. [Exhibits A-1 – A-3]. The current version of Formosa Texas' discharge permit is TPDES Permit No. WQ0002436000 (the "**Permit**"), which became effective on June 10, 2016. [Exhibit A-3].

The Plant has several outfalls through which either treated wastewater or stormwater is discharged. For each outfall at the Plant, the Permit states that "there shall be no discharge of floating solids … **in other than trace amounts**." [Exhibit A-3, pp. 2b, 2e, 2h, & 2l-2o] (emphasis added). This language has been included in the various NPDES permits issued to Formosa Texas since at least 1993. [Exhibit A-1, pp. 5, 11, 18 & 23; Exhibit A-2, pp. 2b, 2e, & 2i-2n]. Thus, for the last twenty-five years or more, Formosa Texas has been authorized to discharge some amount of floating solids from each of its outfalls.

C. CWA Citizens' Suits

The citizen suit provision of the CWA, 33 U.S.C. § 1365, empowers private citizens to bring suit in federal court for certain alleged violations only "when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987) (emphasis added). Importantly, the CWA limits authority for private civil actions to suits "against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the [EPA] or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). Of course, discharges within the scope of a permit and not in violation of its provisions are not subject to challenge by a citizen suit. *See Piney Run Preservation Ass'n*, 268 F.3d at 266.

V. THE PARALLEL PROCEEDINGS OF THE TCEQ ENFORCEMENT ACTION AND THIS LAWSUIT

A. March 2016: TCEQ Inspection

In March 2016, TCEQ investigators conducted a multi-day inspection of the Plant. Following the inspection, the investigators issued an Exit Interview, in which they alleged that Formosa Texas had "[f]ailed to prevent the discharge of floating solids (plastic pellets) in other than trace amounts." [Exhibit A-4]. The Exit Interview marked the first time that TCEQ had ever alleged that Formosa Texas had discharged more than a trace amount of floating solids in violation of its discharge permit.

B. May 2016: TCEQ Notice of Violation

On May 13, 2016, TCEQ issued a Notice of Violation to Formosa Texas. [Exhibit A-5]. The notice stated that, during the March inspection, "plastic pellets were observed in Cox Creek, downstream of the Facility." *Id*., p. 3. Based upon these observations, TCEQ repeated its allegation that Formosa Texas had "[f]ailed to prevent the unauthorized discharge of floating solids or visible foam in other than trace amounts" in violation of its Permit. *Id*.

C. September 2016: TCEQ Follow-Up Inspection

In September 2016, TCEQ investigators conducted another multi-day inspection of the Plant to determine the status of the outstanding alleged violation for discharge of floating solids in other than trace amounts. Following the inspection, the investigators issued another Exit Interview, in which they again alleged that Formosa Texas had "[f]ailed to prevent the discharge of floating solids (plastic pellets) in other than trace amounts." [Exhibit A-6].

D. April 2017: Plaintiffs' Notice of Intent to Sue

On April 6, 2017, Plaintiffs sent a "Notice of Intent to File Citizen Suit for [Alleged] Violations of the Clean Water Act" to Formosa Texas. [Exhibit A-7]. In the notice, Plaintiffs

alleged that Formosa Texas had been illegally discharging floating solids, including plastic pellets, from its Plant.

E. May 2017: TCEQ Notice of Enforcement

On May 1, 2017, TCEQ sent a Notice of Enforcement to Formosa Texas. [Exhibit A-8]. Based upon the March and September 2016 inspections, TCEQ again alleged that Formosa Texas had "[f]ailed to prevent the unauthorized discharge of floating solids or visible foam in other than trace amounts" in violation of the Permit. *Id*. TCEQ stated that a "formal enforcement action" had been initiated and encouraged Formosa "to immediately begin taking actions to address the outstanding alleged violation." *Id*.

F. July 2017: Formosa Texas' Corrective Action in Response to the TCEQ Enforcement Action and Plaintiffs' Lawsuit

As TCEQ has since recognized, by July 31, 2017, Formosa Texas had undertaken an investigation to determine the potential sources of the floating plastics and had taken corrective action by, among other things, implementing a recovery system to minimize any future discharges of floating solids. [Exhibits A-9 and A-13, § I.3.b].

On that same day, July 31, 2017, Plaintiffs filed their Complaint in this lawsuit, alleging two claims for relief. By the first claim, Plaintiffs alleged that, since at least January 2016, Formosa had been violating its Permit by discharging "floating solids or visible foam in other than trace amounts…." Complaint, pp. 22-23. By the second claim, Plaintiffs asserted that Formosa "failed to report" those alleged permit violations to TCEQ. Complaint, pp. 23-24.

G. March 2018: Formosa Texas and the TCEQ Executive Director Reach Agreement on Agreed Order and Formosa Texas Pay Assessed Penalty

On March 6, 2018, the TCEQ Executive Director and Formosa Texas agreed on the terms of a proposed Agreed Order in the pending enforcement action for the alleged discharge of

floating solids in more than trace amounts. [Exhibit A-9]. The Agreed Order contains Findings of Fact, Conclusions of Law and various Ordering Provisions. In the Findings of Fact, TCEQ recognizes the corrective actions that Formosa Texas has taken in response to the enforcement action:

> The Executive Director recognizes that [Formosa Texas] ha[s] implemented the following corrective measures at the Facility:
>
> a. By June 29, 2017, collected and properly disposed of approximately 112,000 pounds of debris and plastic pellets from Lavaca Bay, and approximately 327,000 pounds of debris and plastic pellets from Cox Creek; and
>
> b. By July 31, 2017, determined the potential sources of the plastic pellets and implemented a pellet recovery system to minimize future discharges of solids, including plastic pellets from the Facility by installing a cone filter, floating booms, wedge and gate screens, and gabions.

[Exhibit A-9, p. 2].

In the Conclusions of Law of Fact, the Agreed Order provides, among other things, that Formosa Texas is "subject to the jurisdiction of the TCEQ, that Formosa Texas "failed to prevent the discharge of solids in other than trace amounts" in violation of its Permit, and that "TCEQ has the authority to assess an administrative penalty" against Formosa Texas for those violations. *Id*.

By the Ordering Provision, TCEQ assesses a penalty against Formosa Texas in the amount of $121,875.00, after applying the applicable penalty criteria. In addition, in the Ordering Provision, TCEQ orders Formosa Texas to undertake various "technical requirements," which are in addition to the technical corrective actions already undertaken and completed by Formosa Texas in response to the TCEQ enforcement action. The additional technical requirements include:

> Within 60 days after the effective date of this Order and on a semi-annual basis thereafter, conduct a comprehensive evaluation of the Facility, Cox Creek, and Lavaca Bay, and remove and properly dispose of any discharged solids, including plastic pellets found during the evaluation of Cox Creek or Lavaca Bay and any pellet loss found during the evaluation of the Facility.

Id., p. 3.

H. May 2018: TCEQ Gives Public Notice of Proposed Order and Solicits Comments

On May 28, 2018, TCEQ gave public notice of the proposed Agreed Order and solicited public comments. [Exhibit A-10].

I. June 2018: Plaintiffs Submit Extensive Comments to TCEQ on the Proposed Order

Plaintiffs actively participated in the TCEQ enforcement proceedings. On June 26, 2018, Plaintiffs submitting extensive comments to TCEQ regarding the proposed Agreed Order. [Exhibit A-11]. Specifically, Plaintiffs argued that the $121,875.00 penalty assessed by TCEQ was too small [*Id*., p. 3 and pp. 7-14] and that Formosa Texas should be ordered to do more into to "bring the facility back into compliance with its permit." [*Id*., p. 4 & p. 15.]

J. November 2018: After Due Consideration, TCEQ Responds to Plaintiffs' Comments

On November 27, 2018, TCEQ responded to Plaintiffs' comments regarding the proposed Agreed Order. [Exhibit A-12]. TCEQ considered and rejected Plaintiff's arguments related to both the size of the penalty and the alleged inadequacy of the remedy imposed by TCEQ.

K. January 2019: TCEQ Commissioners Approve the Proposed Agreed Order

On January 16, 2019, the TCEQ Commissioners considered, approved and issued the Agreed Order at their agenda meeting. [Exhibit A-13].

VI. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Claims Have Become Moot and Should be Dismissed for Lack of Subject Matter Jurisdiction.

By their first claim, Plaintiffs alleged that Formosa has violated its Permit by discharging "floating solids or visible foam in other than trace amounts…." Complaint, pp. 22-23. This alleged violation, however, is the very subject of the Agreed Order entered by TCEQ, the regulatory authority charged with ensuring Formosa Texas' compliance with its Permit. Plaintiffs' only other claim—that Formosa failed to report such alleged permit violations to TCEQ—is directly related to, and arises from, the first claim. As a result, due to the Agreed Order issued by TCEQ on January 16, 2008, both of Plaintiffs' claims are moot and should be dismissed for lack of jurisdiction.

Mootness is part of the Article III standing inquiry applicable to all suits filed in federal court, including citizen suits brought under the CWA. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 189-94 (2000). Article III of the U.S. Constitution provides courts with jurisdiction over actual cases or controversies. U.S. Const. art. III, § 2, cl. 1. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quotations and citations omitted).

As the Fifth Circuit has explained, "[m]ootness is 'the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' " *Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008), *cert. denied*, 555 U.S. 945 (2008) (citing *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006)). If a case has been rendered moot, a federal court lacks the requisite constitutional authority to resolve

issues raised by the parties. *In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Comfort Lake Ass'n Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 354 (8th Cir. 1998).

1. Under Fifth Circuit Precedent, Plaintiffs' Case Has Been Mooted by the Agreed Order in the TCEQ Enforcement Action.

In *City of Dallas*, the Fifth Circuit held that the district court lacked subject matter jurisdiction to hear a CWA citizen suit because all violations alleged in the lawsuit were addressed in a consent decree entered into by the government regulator and the defendant after the citizen suit was filed. 529 F.3d at 529. Entry of the consent decree assessing monetary penalties and imposing binding obligations on the defendant constituted a change in circumstances that rendered the citizen suit action moot.

The facts in this case are the same, in all material respects, as the facts at issue in *City of Dallas*. In both cases:

- A non-government plaintiff gave notice of intent and filed a CWA citizen suit alleging violations of the defendant's discharge permit;
- After the plaintiff filed suit, the appropriate regulatory authority initiated an enforcement action against the defendant for the same violations alleged by the plaintiff in the citizen suit;
- In initiating the enforcement action, the regulatory authority alleged violations of the defendant's discharge permit and instructed the defendants to correct the violations;
- The regulatory authority and the defendant settled the enforcement action by agreeing to the terms of an order under which the defendant was required to pay monetary penalties and to comply with certain technical requirements pursuant to a schedule.

In this case, unlike in the *City of Dallas*, Formosa Texas undertook substantial corrective measures in response to the TCEQ enforcement action **before** the Agreed Order was drafted, agreed upon and issued by TCEQ, rather than afterwards. Nevertheless, the corrective actions undertaken by Formosa were not voluntary, but rather were done in response to the enforcement action and TCEQ's demands therein. Specifically, as the Agreed Order recognized, in response to the enforcement action, Formosa Texas undertook extensive clean-up operations in Cox Creek and Lavaca Bay, "determined the potential sources of the plastic pellets[,] and implemented a pellet recovery system to minimize future discharges of solids, including plastic pellets from the Facility…." [Exhibit A-13, § I.3.b]. The Agreed Order imposes **additional** technical requirements on Formosa Texas, including further evaluations and clean-up operations, and it requires Formosa Texas to pay a penalty of $121,875.00.

2. An Agreed Order in an Administrative Enforcement Action Is Sufficient to Moot a Citizen Suit.

Although a federal district court approved the consent order in *City of Dallas*, judicial involvement in the administrative enforcement action is not necessary to moot Plaintiffs' claims. *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) ("If the state [administrative] enforcement proceeding has caused the violations alleged in the citizen suit to cease without any likelihood of recurrence[,] ... the citizen action must be dismissed."); *see also Comfort Lake*, 138 F.3d at 357.

In *Comfort Lake*, for example, the state regulatory agency responsible for enforcement of the CWA in Minnesota issued a NPDES permit to the defendants relating to construction activities. After receiving several complaints, the state regulator investigated and eventually issued a notice of violation to defendants. *Id.* at 353. In the meantime, the plaintiffs in that case

sent a notice of intent to file a CWA citizen suit. *Id*. at 353-54. Before the litigation was concluded, however, defendants terminated their NPDES permit and entered into a stipulation agreement with the state regulator that assessed civil penalties and addressed all alleged permit violations known to the state regulator at the time of the agreement. *Id*. at 354. As a result, the district court dismissed plaintiffs' claims as moot. *Id*. The Eighth Circuit affirmed, holding that the state regulator's stipulated agreement and other actions at the site effectively mooted plaintiff's claims for injunctive relief and precluded plaintiff's claims for civil penalties. *Id*. at 357.

3. The TCEQ Agreed Order Covers All of Plaintiff's Claims, and Plaintiffs May Not Collaterally Challenge the Order in this Citizen Suit.

All of the allegations in Plaintiffs' Complaint are addressed by the actions undertaken by Formosa in response to the TCEQ enforcement action combined with Formosa's legal obligation to comply with TCEQ Agreed Order, including paying the monetary penalty contained therein and complying with the additional technical requirements set forth therein. As private attorneys general, Plaintiffs are bound by the terms of the Agreed Order. In *Atlantic States Legal Foundation*, the state regulator commenced an enforcement action after the plaintiff filed a CWA citizen suit. The state regulator and defendant resolved the enforcement action by entering into a voluntary settlement. The court dismissed the plaintiff's CWA citizen suit claims for mootness on grounds that when a settlement agreement with the regulator covers the same violations alleged by a citizen plaintiff (and extracts penalties), mootness applies. 933 F.2d at 127. The court held that a citizen suit "cannot proceed solely for the purpose of challenging the terms of a settlement reached by state officials so long as the settlement reasonably assures that the violations alleged in the citizen suit have ceased and will not recur." *Id*. at 125.

Plaintiffs' claims in this case involve alleged discharges of floating solids into Cox Creek and Lavaca Bay, which are addressed by the corrective actions taken by Formosa in response to TCEQ's demands in the enforcement action and by the terms of the Agreed Order. During the public comment period for the settlement agreement, Plaintiffs submitted extensive comments on the Agreed Order. Among these comments was the assertion that the penalty imposed was too small and that the actions taken and ordered did not provide a sufficient remedy to prevent future unauthorized discharges. [Exhibit A-11]. TCEQ considered and rejected those concerns. [Exhibit A-12].

As the state agency responsible for the administration of the CWA, TCEQ's final enforcement action reflected in the Agreed Order "is entitled to considerable deference" with respect to the selection of an appropriate remedy. *Comfort Lake*, 138 F.3d at 357. Plaintiffs cannot collaterally attack the Agreed Order because they are dissatisfied with its final terms. As the Second Circuit noted in *Atlantic States Legal Foundation*, "[t]he Supreme Court has held that a citizen suit under the [CWA] may neither be addressed wholly to past violations nor seek to recover fines and penalties that the government has elected to forego." 933 F.2d at 127 (emphasis added) (citing *Gwaltney*, 484 U.S. at 60-61). If Plaintiffs are now allowed to seek penalties that TCEQ chose to forego, TCEQ's "discretion to enforce the [CWA] in the public interest would be curtailed considerably." *Gwaltney*, 484 U.S. at 61.

Failing to dismiss Plaintiffs' claims would be inconsistent with TCEQ's considered judgment that the actions taken by Formosa in response to the enforcement action combined with the penalty and actions required by the Agreed Order were sufficient to address the Permit violations on which Plaintiffs' claims are bases. Citizens' suits are supposed to "supplement rather than … supplant governmental action." *City of Dallas*, 529 F.3d at 529. As such, Plaintiffs

cannot pursue claims for the purpose of having this Court second guess TCEQ's decisions regarding the amount of the penalty and the type of technical corrective requirements to be imposed, particularly where TCEQ has expressly considered and deliberately rejected Plaintiffs' arguments on these points. TCEQ has acted, and Plaintiffs cannot usurp the agency's authority by continuing this suit, which the Agreed Order has mooted.

The TCEQ enforcement action and the Agreed Order encompasses and addresses the violations alleged by Plaintiffs and reasonably ensures future compliance by Formosa. As private attorneys general, Plaintiffs' interests in this litigation have been resolved by TCEQ enforcement action. Because Plaintiffs' interests are satisfied, there is no longer a live controversy, and their request for civil penalties and injunctive relief is moot. Both of their claims should be dismissed.

4. It Is Plaintiffs' Burden to Overcome a Presumption of Mootness.

The applicable mootness standard is the "realistic prospect test" under which the burden is on the party denying mootness to prove a realistic prospect that the alleged violations will continue despite the consent order. *City of Dallas*, 529 F.3d at 528; *Comfort Lake*, 138 F.3d at 355; *Atlantic States Legal Found., Inc.*, 933 F.2d at 127-28. In *City of Dallas*, the Fifth Circuit held that the realistic prospect test applies to cases in which compliance has been compelled by enforcement action taken after a citizen suit was filed. 529 F.3d at 527-29; *see also Comfort Lake*, 138 F.3d at 355 (applying the realistic prospect test where a stipulation agreement compelled compliance).[2] As the Fifth Circuit explained, the realistic prospect test "respects Congress's intent that citizen suits 'supplement rather than . . . supplant government action.' " *City of Dallas*, 529 F.3d at 528 (quoting *Gwaltney*, 484 U.S. at 60).

[2] *See Louisiana Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012) (holding that a CWA citizen suit was not moot because the consent decree was entered into eight years before plaintiffs filed suit).

Here, because Formosa's compliance was compelled by the TCEQ enforcement action and the Agreed Order, the burden is on Plaintiffs to prove that their claims are not moot. As the Eighth Circuit observed in *Comfort Lake*, in situations where a company enters into a settlement agreement under threat of an enforcement action by a state regulator, there is "nothing voluntary about [a defendant's] compliance activities...." *Comfort Lake*, 138 F.3d at 355. Because Formosa has been compelled by a state enforcement action to take corrective action and is subject to an Agreed Order in that enforcement action compelling it to pay a penalty and take further corrective action, Plaintiffs have the burden to prove a realistic prospect that alleged violations will continue despite the actions taken and the obligations imposed on Formosa. Since Plaintiffs cannot meet this burden, their claims must be dismissed as moot.

B. Because Plaintiffs' Failure-to-Report Claim Does Not Allege the Discharge of a Pollutant, Judgment Should Be Granted to Formosa on that Claim for Failure to State a Claim Upon Which Relief May Be Granted.

Even if the Court were to conclude that Plaintiffs' second claim (for failure to report alleged permit violations) were not moot, the Court should grant judgment to Formosa on that claim because it does not properly allege the "violation of [] an effluent standard or limitation under [the CWA] or [] an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation," as is required for a citizens suit. 33 U.S.C. § 1365(a). An "Effluent limitation" is defined as "any restriction … on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11) (emphasis added). By the second claim, Plaintiffs allege only that Formosa failed to report alleged violations of its Permit to TCEQ. Even if taken as true, this allegation does not constitute a "discharge of a pollutant" from a "point source" capable of

giving rise to a citizen suit under the CWA. As such, Plaintiffs' second claim fails to state a claim for which relief can be granted and should be dismissed.

CONCLUSION

For the reasons above, the Court should grant Formosa's Motion and dismiss both of Plaintiffs' claims as moot under Federal Rule of Civil Procedure 12(b)(1). To the extent the Court does not dismiss Plaintiff's second claim as moot, the Court should grant judgment to Formosa on such claim under Federal Rule of Civil Procedure 12(c) because it fails to state a claim upon which relief can be granted.

WHEREFORE, Formosa prays that the Court grant this Motion and grant all such other and further relief as this Court may deem just and proper.

Respectfully submitted,

By: */s/ J. Stephen Ravel*

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 18, 2019 all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3)(A).

/s/ J. Stephen Ravel
J. Stephen Ravel